

# Meting Out Misfortune: How the Courts are Alloting the Costs of Maritime Injury in the Eighties

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# METING OUT MISFORTUNE: HOW THE COURTS ARE ALLOTTING THE COSTS OF MARITIME INJURY IN THE EIGHTIES

*Graydon S. Staring\**

## INTRODUCTION

No other division of the maritime law has seen such striking changes in the last thirty years as the doctrines by which it transfers the losses for maritime injuries from those upon whom they first fall. No discussion of current doctrines and trends can be viewed in isolation from three decades of rapid development, nor from many decades of previous doctrinal development. But this article will describe all of this only briefly, as a great deal has been published about it already.

While there are many other good sources, I refer you to my own article published in 1957<sup>1</sup> for the historical background of contribution and for the evidence that it should properly occupy a prominent place in the law of maritime injury despite the then generally held view that it was unavailable, and to a recent article by an excellent scholar of the subject, Francis J. Gorman,<sup>2</sup> leading us up to the beginning of this decade in the development of indemnity and contribution.

Rather than referring to all of the trial court cases which support a position or suggest another one, I will look at the evidence of decisions in the United States Supreme Court and the United States Courts of Appeals, referring to district court cases only when they are needed to fill a gap or because they seem especially significant.

## BACKGROUND—CONTRIBUTION AND INDEMNITY BEFORE THE FIFTIES

A brief review of nineteenth century developments is necessary at this point. Throughout much of the nineteenth century, the doctrine of contribution was recognized in collision cases and other vessel casualties but was restricted to the Moiety Rule, which is to say that it dictated only equal division of damages between the tortfeasors.<sup>3</sup> Contribution

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1. Staring, *Contribution and Division of Damages in Admiralty and Maritime Cases*, 45 *Calif. L. Rev.* 304 (1957).

2. Gorman, *Indemnity and Contribution under Maritime Law*, 55 *Tul. L. Rev.* 1165 (1981).

3. Staring, *supra* note 1, at 310-16.

was available by crosspleading when the several tortfeasors were present in the same action<sup>4</sup> and, at least by the beginning of the twentieth century, it was available by a separate action to recover after payment of the judgment by one of the tortfeasors.<sup>5</sup> The doctrinal foundation of contribution was not exotic; it was grounded firmly upon the direct liability of the contributor in tort and the principle that he should respond for his own derelictions, whether or not he was sued in the first instance.<sup>6</sup> Well before the end of the century, contribution had spread from collision to personal injury cases where the collision doctrine was the basis for reducing rather than barring recoveries of injured longshoremen and other plaintiffs in cases of vessel negligence. In that context, apportionments finer than the *Moiety Rule* began to occur although the *Moiety Rule* itself persisted firmly outside of injury and death claims, the relationship of the two applications being judicially forgotten.<sup>7</sup>

In retrospect, one can see a trend developing through the nineteenth century and early part of the twentieth century toward the development of contribution and apportionment by degree of fault as pervasive doctrines in the maritime law, absent some accidental interruption. As we continue, however, we can see that an interruption occurred, and I think we can identify the accident.

In the first five decades of the twentieth century things moved slowly, although important developments occurred. At the outset, the right of seamen to recover for injuries caused by unseaworthiness was announced.<sup>8</sup> In 1920 the *Jones Act*<sup>9</sup> was passed, by which seamen acquired the right to recover for the negligence of their employers, and the doctrine of apportionment according to fault was established by statute for such recoveries.<sup>10</sup> It was judicially settled also that the doctrine of comparative fault applied to seamen's recoveries for unseaworthiness.<sup>11</sup>

In 1927 the *Longshoremen's and Harbor Workers' Compensation Act* (LHWCA or Act) was passed, which declared the employers of these workers shielded from damage suits by their injured employees but gave both employee and employer an interest in damage suits which might be brought against third parties, usually vessels and their owners.<sup>12</sup> In the remainder of the 20's and 30's the Act appeared to work well

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4. *Id.* at 335.

5. *Id.* at 335.

6. *Id.* at 334.

7. *Id.* at 321-24.

8. *The Osceola*, 189 U.S. 158, 23 S. Ct. 483 (1903).

9. Codified at 46 U.S.C. § 688 (1983).

10. 45 U.S.C. § 53 (1983) (incorporated by reference).

11. *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424, 59 S. Ct. 262 (1939).

12. 33 U.S.C. §§ 901 et seq. (1983).

without resulting in an extraordinary amount of third-party litigation. This was no doubt due to the benefits being reasonably scaled to the economy of that period and the fact that injury damage judgments were far more conservative than they later became, while employers, then as now, were usually disinclined to bring suits against their shipowner customers as an alternative to passing their premiums along as elements of their service rates.

#### THE FIFTIES AND SIXTIES

A decline in the adequacy of compensation payments produced greater pressure for damage recoveries and in 1946 in the *Sieracki* case<sup>13</sup> the Supreme Court was persuaded to hold that longshoremen were entitled to the same warranty of seaworthiness as seamen on the basis that they were doing traditional seamen's work. The same rule would later be applied indiscriminately to other harborworkers. The multiplication of damage suits against shipowners, resulting in many instances from the negligence of stevedores and longshoremen themselves, brought pressure to find a way to recover back again from the contractor employer.

The Supreme Court had decided<sup>14</sup> that an express indemnity agreement in favor of the shipowner in a stevedore contract was valid and enforceable, but there were many stevedore contracts which did not contain such an agreement.

Resort was had to what was then taken to be the well-established admiralty rule of contribution. But in the *Halcyon* case<sup>15</sup> the Supreme Court denied the possibility of recovering over from a negligent stevedore for even the modest contribution of the amount of its liability in compensation and medical payments. The Court was right, of course, because the employer could not have been held directly liable in a tort suit for damages and thus a fundamental requirement of admiralty contribution was missing. The Court made a quite unnecessary and extravagantly erroneous statement that its own decisions had established no basis for the application of the maritime doctrine of contribution in other than collision cases, and until the Seventies the lower courts considered themselves bound to restrict contribution accordingly.<sup>16</sup>

In the same period some shipowners were seeking not just contribution, but indemnity<sup>17</sup> in reliance on respectable old tort cases based

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13. *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S. Ct. 872 (1946).

14. *American Stevedores v. Porello*, 330 U.S. 446, 67 S. Ct. 847 (1947).

15. *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 72 S. Ct. 277 (1952).

16. *Staring*, *supra* note 1, at 304-05.

17. Compare *Slattery v. Marra Bros.*, 186 F.2d 134 (2nd Cir. 1951) with *States S.S. Co. v. Rothschild Intl. Stevedoring Co.*, 205 F.2d 253 (9th Cir. 1953).

upon the distinctions between primary and secondary liability, or active and passive negligence.<sup>18</sup> This approach was ultimately doomed for the same reason as contribution in *Halcyon* and was eventually put down by the Supreme Court in cases where it was no longer needed anyway.<sup>19</sup>

With the *Ryan* case,<sup>20</sup> the shipowner succeeded in its quest for indemnity. The Supreme Court perhaps recognized, for there was old authority, that the stevedore's contract (as any contract for expert service) involved an implied obligation (which the Court called a warranty) of safe, proper and workmanlike performance (hereafter, the "warranty of workmanlike performance"), the breach of which would normally give rise to an action for damages. The obstacle to recovery in *Halcyon* did not apply here because *Halcyon* depended upon tort and *Ryan* upon contract, and a party enjoying immunity by law for tort liability could nevertheless contract to be liable for the same occurrence. It was probably thought by some that the *Ryan* court had regretted *Halcyon*, but since *Ryan* the Court has thrice reaffirmed *Halcyon* and clearly distinguished the two cases.<sup>21</sup>

The warranty of workmanlike performance which the Court embraced in *Ryan* had originated in the context of negligence when unseaworthiness was undreamed of<sup>22</sup> and, although the *Ryan* case had involved unseaworthiness, the Supreme Court soon made it clear that the *Ryan* indemnity was equally available when the shipowner had been initially held for negligence.<sup>23</sup> In the same case, the Supreme Court decided that while mere contributory negligence on the shipowner's part was not a defense to a claim for indemnity, the shipowner's action in hindering or interfering with the stevedores' operation might constitute "conduct . . . sufficient to preclude recovery."<sup>24</sup> Also, in the years soon after the *Ryan* decision, its application was extended to charterers, owners and consignees who had not contracted with the employer but

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18. E.g., *Washington Gaslight Co. v. District of Columbia*, 161 U.S. 316, 16 S. Ct. 564 (1896).

19. *Weyerhaeuser S.S. Co. v. Nacirema Operating Co.*, 355 U.S. 563, 78 S. Ct. 438 (1958).

20. *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 76 S. Ct. 232 (1956).

21. *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 74 S. Ct. 202 (1953); *Atlantic Coast Line R.R. v. Erie Lackawanna R.R.*, 406 U.S. 340, 92 S. Ct. 1550 (1972); *Edmonds v. Campagnie Generale Trans-Atlantique*, 443 U.S. 256, 99 S. Ct. 2753 (1979).

22. The court relied on earlier decisions such as *Mowbray v. Merryweather*, [1895] 2 Q.B. 640, and *Bethlehem Shipbuilding Corp. v. Joseph Gutrad Co.*, 10 F.2d 769 (9th Cir. 1926).

23. *Weyerhaeuser S.S. Co.*, 355 U.S. 563, 78 S. Ct. at 438 (1958).

24. *Id.* at 567, 78 S. Ct. at 441.

were sufficiently related to the vessel to be viewed as interests for whose benefit the warranty existed.<sup>25</sup>

One more development will bring us to the threshold of the Seventies. The LHWCA provides for a statutory assignment of the longshoreman's third-party damage claim to his employer if he has not brought suit on it within six months after an award of compensation. The Act also provides for the distribution of the recovery between the employer and the employee, whichever brings the suit.<sup>26</sup> It was natural to suppose, therefore, that Congress had occupied the field and expressed the conditions under which the longshoreman's employer might sue the vessel on account of the longshoremen's injury.

But in the *Burnside* case<sup>27</sup> in 1969 the Supreme Court held otherwise. The underlying problem was that the longshoreman had been killed and the recovery against the shipowner for his death then depended upon a state wrongful death act with a limit on damages, whereas the employer had already incurred a compensation liability far beyond that limit and clearly could not make its recovery through its lien on the suit of the longshoreman's survivors. The Court held that it had been error to dismiss the stevedore's complaint; in other words, it could not be said at the pleading stage that the shipowner was incapable of having committed a tort against the employer for which it would have to pay damages and the matter was not controlled by the provisions of the LHWCA. Questions of contribution, that is the effect of contributory negligence, and of possible defenses were not reached.

#### MAJOR EVENTS OF THE SEVENTIES

Four major events of the Seventies continued the rapid change shaping our present trends. The first of these was the 1972 Amendment of the LHWCA and, in particular, the amendment of section 5. A new subsection was added<sup>28</sup> that limited the longshoremen's and harbor workers' recoveries against vessels to the ground of negligence, thereby nullifying the *Sieracki* decision and abolishing the right of a vessel, either by express or implied agreement, to recover indemnity or contribution from the employer. The vessel was defined in the Act to include her owners, charterers, agents and crew.<sup>29</sup>

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25. E.g., *Crumady v. The J.H. Fisser*, 358 U.S. 423, 79 S. Ct. 445 (1959); *Waterman S.S. Corp. v. Dugan & McNamara, Inc.*, 364 U.S. 421, 81 S. Ct. 200 (1960).

26. 33 U.S.C. § 933 (1983).

27. *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404, 89 S. Ct. 1144 (1969).

28. 33 U.S.C. § 905(b) (1983).

29. *Id.* § 902(21).

The pattern of indemnity suits as we had known it since *Ryan* was at an end. But was all indemnity, whether by tort, contract or restitution, precluded? Did the warranty of workmanlike performance perish or only the consequent damages in a specific class of cases? And was the newly stated negligence liability of the vessel limited only by reduction for the contributory negligence of the injured worker or was it further limited to the vessel's percentage of all the fault involved, including that of the stevedore, who would respond only by compensation benefits under the Act, but through its lien could make an indirect recovery from the vessel for the consequences of its own major fault? These questions remained to be answered.

The lower courts had begun seriously questioning the overstatement of the Supreme Court about contribution in the *Halcyon* case and advanced the view that the case could be reconstrued and limited to its circumstances so that contribution might be allowed in injury cases when the contributor was not immune to a damage suit, as it was in *Halcyon*.<sup>30</sup> In the *Cooper Stevedoring* case<sup>31</sup> the Supreme Court fully vindicated this view, restricting the *Halcyon* holding to cases of statutory immunity. It was striking that the case itself allowed contribution against a stevedore. The longshoreman had been injured while discharging cargo, and the vessel owner sued the loading stevedore for indemnity or contribution. Indemnity was barred by the conduct of the shipowner, but with *Halcyon* restricted to its proper scope, it was no bar to contribution since the contributing stevedore was not the employer of the injured longshoreman and thus had no statutory immunity with respect to his case and could have been sued by him directly.

As the *Cooper Stevedoring* case had arisen before the 1972 Amendments, it was not affected by them but in any event it is difficult to see anything in those Amendments indicating a desire to protect someone other than the employer simply because he happens to be engaged in the same business and be governed by the same Act as the employer.

In 1975 in the *Reliable Transfer* case,<sup>32</sup> the Supreme Court brought the Moiety Rule to an end and adopted proportional damages for collisions and obviously also for analogous vessel casualties since stranding, rather than collision, was actually involved. Although in decreeing apportionment for collisions and similar casualties the Court did not generalize on maritime contribution, the terms in which it embraced the

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30. See *Horton & Horton, Inc. v. T/S J.E. Dyer*, 428 F.2d 1131 (5th Cir. 1970); *Watz v. Zapata Off-Shore Co.* 431 F.2d 100 (5th Cir. 1970).

31. *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106, 94 S. Ct. 2174 (1974).

32. *United States v. Reliable Transfer Co.*, 421 U.S. 397, 95 S. Ct. 1708 (1975).

apportionment rule leave the reader with little doubt that the rule must apply in all cases of maritime contribution.

What happened next is better described as a non-event, in that it changed nothing though it did so emphatically. In the *Edmonds*<sup>33</sup> case, decided by the Supreme Court in 1979, in which *certiorari* had been sought by both parties to resolve the issue for the country, the Supreme Court was asked to hold that the true meaning of the 1972 Amendment to section 5 of the LHWCA was to hold the shipowner only for his own negligence in the special sense that he should be liable only for that portion of the damages proportional to his share of all the negligence involved, including that of the stevedore-employer, where the stevedore had been found 80 percent at fault—10 percent through the injured man himself, and 70 percent through other employees. This interpretation, if adopted, would have left the stevedore, when he was largely at fault, to bear the major burden himself through compensation by reducing the damage judgment and requiring the stevedore to give appropriate credit on his lien recovery. The Court rejected this position and held the vessel's damages reducible only by the injured man's proportion of fault.

With this background in mind, we are now ready to examine where we are and where we are going in the Eighties.

#### CURRENT PATTERNS AND TRENDS

##### *The State of the Warranty of Workmanlike Performance*

Some viewed the *Ryan* warranty of workmanlike performance as a creature of the warranty of seaworthiness which depended upon the latter for its continued existence. The Ninth Circuit Court of Appeals expressed this view in a case decided shortly after the 1972 Amendments but which was not dependent upon them.<sup>34</sup> The question presented was whether one contractor to a vessel should have the benefit of the warranty from another contractor with the same vessel. The court held that it should not and, as one ground of the holding, denied that the warranty of workmanlike performance ran to anyone who was not held for a breach of the warranty of seaworthiness, saying:

The rationale underlying *Ryan* and the later cases is that when a shipowner owes a duty of seaworthiness to an injured party (and consequently its liability is not dependent on a finding of its fault) a corresponding duty of indemnity should devolve upon a stevedore whose failure to perform with reasonable safety caused the injury . . . . The circumstance which gives rise to

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33. *Edmonds*, 443 U.S. at 256, 99 S. Ct. at 2753.

34. *Davis v. Chas. Kurz & Co.*, 483 F.2d 184 (9th Cir. 1973).



the implied warranty is the duty of seaworthiness owed by the party seeking indemnification. . . . That circumstance is not present here.<sup>35</sup>

In taking this position the court ignored the rationale of the Supreme Court in *Ryan* that it was not inventing a duty but only holding that its enforcement was not forbidden by the Act. It also ignored the Supreme Court's explicit application of the warranty to pure negligence cases.<sup>36</sup> If the Ninth Circuit were right, then the warranty no longer existed after 1972, at least in cases to which the Act applied, since the foundation warranty of seaworthiness had been abrogated by statute. The court was not right, however, as the Supreme Court in the *Scindia* case in 1981 reaffirmed the *Ryan* warranty as one of the foundations for the formulation of the shipowner's duty of care under the 1972 Amendments.<sup>37</sup>

Had the warranty survived as a moral precept only? It had, after all, been applied in various cases of damage or injury outside the field of injury under the Longshoremen's Act in which it had been announced. In addition to the implications of indemnity judgments to be mentioned later, we have express authority that the warranty lives as a rule of liability. In 1982, in a case where a barge sank because of improper loading by a stevedore, the United States Fourth Circuit Court of Appeals held that the stevedore's warranty of workmanlike performance extended not only to the barge owner and cargo owner, but also to the tug owner and charterer.<sup>38</sup> And in 1983 the Eleventh Circuit Court of Appeals stated the matter very clearly:

The *Ryan* doctrine . . . included two facets: an implied undertaking by a stevedore to render workmanlike performance and the stevedore's duty to indemnify the owner for liability arising out of its breach of duty. The first of these principles retains its vitality. What Congress abandoned in the 1972 Amendments was the notion that any breach of the stevedore's warranty of workmanlike service requires him to indemnify the vessel for all liability that breach might cause, regardless of the fault of the vessel.<sup>39</sup>

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35. *Id.* at 187.

36. *Weyerhaeuser S.S. Co. v. Nacriema Operating Co.* 355 U.S. 563, 98 S. Ct. 438 (1958).

37. *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 101 S. Ct. 1614 (1981).

38. *Salter Marine, Inc. v. Conti Carriers & Terminals*, 677 F.2d 388 (4th Cir. 1982).

39. *Smith & Kelly Co. v. S.S. Concordia Tadj*, 718 F.2d 1022, 102627 n.4 (11th Cir. 1983) (citations omitted); See also *Maritime Overseas Corp. v. Northeast Petro. Indus., Inc.*, 706 F.2d 349 (1st Cir. 1983).

There seems to be no reasonable basis for claiming that Congress did anything to the warranty, except to prevent it from giving rise to damages in the situation with which Congress was expressly concerned and perhaps in a totally analogous situation where a longshoreman is employed by the United States Government.<sup>40</sup>

The warranty of workmanlike performance has become an endangered species of snake which the courts do not want to kill but do not like to handle. The obligation which it has always expressed is eminently sensible as a duty of some degree, but it is difficult to see why it should ever have been a warranty. As a mere duty it does not owe its origin to the warranty of seaworthiness, but it seems more than likely that the warranty of seaworthiness has something to do with the Supreme Court's having called this obligation a warranty in the *Ryan* case.

Apart from a few instances where public policy has intervened by statute<sup>41</sup> or otherwise<sup>42</sup> there is no reason why parties should not be allowed to contract for full responsibility or, in other words, the assumption of full risk involved in their common enterprise. When responsibility is not met or the risk materializes, full damages will follow. But such an undertaking should not be raised up by implication. The obligation of workmanlike performance should no doubt continue to exist but without the peculiar designation as a warranty and possibly not as a full risk agreement in the absence of an explicit undertaking to that effect by the parties.

### *Contractual Indemnity*

Of course it could scarcely be argued that the 1972 Amendments had abolished all right whatever to contractual indemnity in injury cases. But when the case begins to approach longshoring or harbor work analogous to it, questions begin to arise about both express and implied contractual liabilities. They seem to arise especially in the Fifth Circuit because of the number of cases there involving offshore operations where there are likely to be numerous contractors. It now seems clear that when the relationship between the injured man and the potential indemnitor is not governed by the LHWCA or when the potential indemnitee is not a "vessel," there is no obstacle to indemnity.

When the employee of a drilling contractor was killed by the explosion of a water heater in the living quarters of a platform owned by the oil company, the latter, when sued, was held entitled to recover from the employer under an express indemnity clause notwithstanding

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40. Compare *Aparicio v. Swan Lake*, 643 F.2d 1109 (5th Cir. 1981) with *Normile v. Maritime Co. of the Phillipines*, 643 F.2d 1380 (9th Cir. 1981).

41. E.g., The Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300 et seq. (1983).

42. E.g., *Bisso v. Inland Waterways Corp.*, 349 U.S. 85, 75 S. Ct. 629 (1955).

that the employer's only direct liability was for compensation payments, since the oil company and its platform could not be classified as a vessel within the scope of the Act.<sup>43</sup> And where an employee of a sub-subcontractor of Exxon had to sleep on an Exxon barge and was injured there, Exxon was permitted to recover from its subcontractor under an express indemnity clause. In the face of an argument based on the 1972 Amendments, the court said:

The relationship between Williams [the subcontractor] and Exxon was not that contemplated by § 905(b). Exxon, unlike a contractor (stevedore, repairmen, etc.) performing work for a ship or vessel owner had not engaged to perform services giving rise to the warranty of workmanlike performance (WWLP) on which the action for indemnity ordinarily rests.<sup>44</sup>

Not all of this law comes from the Fifth Circuit, however. The Second Circuit Court of Appeals has also held that a non-vessel is not barred from recovery under an express indemnity agreement with a stevedore or other employer even though the employer falls under the Act. That Court has said:

[W]e would hesitate to hold that § 905(b) by its own force cuts off the availability of *Ryan* indemnity to a non-vessel in all cases where the concurring negligence of a stevedoring company has caused injuries to the latter's employees, for example, although we do not intend these to be exclusive, where there is a direct contractual relationship between the third party and the stevedores or where the third party is designated as a beneficiary of an express contract between the stevedore and a vessel.<sup>45</sup>

And in a case which involves no express indemnity clause and comes much closer to the old *Ryan* type of case, a shipowner, held negligent in not observing a defect of stowage at the time of loading which resulted in the injury of a discharging was allowed to recover over against a charterer whose charter made it responsible for loading and stowing without any impediment on account of the current provisions of the Act.<sup>46</sup> The same case, in dictum strongly used to fortify the holding, said that the shipowner could also obtain indemnity from the Japanese loading stevedore. The accuracy of this prediction is unknown to the author.

None of the cases referred to depend expressly upon the implied warranty of workmanlike performance. They show, however, the com-

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43. *Olsen v. Shell Oil Co.*, 595 F.2d 1099 (5th Cir. 1979).

44. *Roberts v. Williams-McWilliams Co.*, 648 F.2d 255, 264 (5th Cir. 1981).

45. *Zapico v. Bucyrus-Erie Co.*, 579 F.2d 714, 721-22 (2d Cir. 1979) (citations omitted).

46. *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300 (9th Cir. 1981).

plete lack of impediment to a contractual indemnity which does not transgress the language of section 905(b) and its intent to protect the employer from having to pay anything other than compensation benefits for injury to his own employee. And if, as was previously stated, the warranty of workmanlike performance is still alive and healthy, then similarly there is no other or different impediment to its operation. No doubt some lower court cases have reached inconsistent results, but they do not seem to have support at the appellate level.

The 1984 Amendments to the Act added subsection (C) to section 5 of the LHWCA,<sup>47</sup> with an important qualification or exception to the prohibition against contractual indemnity. It has long been extremely common in the offshore oil industry for contracts among the oil company operators, their contractors, and subcontractors to include "knock-for-knock" agreements under which each party is required to take full economic responsibility for all injuries and losses to its employees and property without regard to fault. Many of these contracts and the services involved do not fall under the Act. In many instances, however, the employments and services do fall under the Act or move in and out of the Act's purview. The result has been legal and contractual confusion in the administration of socially and contractually sensible arrangements aimed at minimizing litigation. The new subsection seeks to remove any impediment to the effectiveness of the "knock-for-knock" agreements in cases falling under the Act by virtue of section 4 of the Outer Continental Shelf Lands Act.<sup>48</sup>

#### *Tort Indemnity and the Burnside Doctrine*

What we sometimes call "tort indemnity" generally depends upon considerations of so-called primary or secondary liability or, more frequently, on active and passive negligence. This kind of indemnity is well described by Gorman as "restitution indemnity."<sup>49</sup> The Supreme Court had put down considerations of primary and secondary liability or active and passive negligence as having no place in the scheme of contractual indemnity.<sup>50</sup> Despite the qualification referring to contractual indemnity, there have been those who wondered whether these considerations had any place left at all in the maritime law. Later appellate decisions indicate that they do.

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47. Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, 1984 U.S. Code Cong. & Ad. News (98 Stat.) 1639 (1984) (to be codified at 33 U.S.C. § 905(c)).

48. 43 U.S.C. § 1333 (1983).

49. Gorman, *supra* note 2, at 1171-72.

50. *Weyerhaeuser S.S. Co.*, 355 U.S. at 569, 78 S. Ct. at 442.

The Fifth Circuit again has been the most fruitful source of cases involving tort indemnity, in large part because of the many offshore oil cases arising in that circuit dealing with disputes among the several contractors involved. The *Tri-State Oil Tool Industries* case,<sup>51</sup> decided in 1969, is the leading case. *Tri-State* involved cross-claims between two companies both under contract to an oil company but having no contract between themselves. The Court of Appeals held that if the district court should find that the one company which was held liable to its own employee on the ground of unseaworthiness of its barge were only passively negligent at most, it should recover indemnity from the other which had been found unquestionably actively negligent. A number of other cases involve the same principle, but it will suffice here to point out that the Fifth Circuit Court of Appeals can be found analyzing cases under the same rubric in 1978<sup>52</sup> and 1981.<sup>53</sup> Unseaworthiness has, without more, been definitely treated as passive negligence,<sup>54</sup> and it is interesting to note that the Fifth Circuit Court of Appeals has treated strict product liability in the same way and held that as between a manufacturer liable on that basis and a shipowner liable for unseaworthiness, there can be no indemnity since the roles of both of them are to be regarded as passive.<sup>55</sup>

In the First Circuit the doctrine has been recently recognized as one involving "great disparity in the fault of the parties."<sup>56</sup> It is also still recognized in the Fourth Circuit.<sup>57</sup> In the Eighth Circuit it is applied to property damage in terms which do not suggest that there would be any other rule for personal injury.<sup>58</sup> As shall be shown below, however, contribution is making inroads upon the doctrine of tort or restitution indemnity.

The *Burnside* holding must be considered here. Under the *Burnside* holding it appeared that a stevedore might at least plead to recover indemnity for its compensation payments to an injured employee on the basis that the shipowner had been negligent toward the stevedore in

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51. *Tri-State Oil Tool Indus., Inc. v. Delta Marine Drilling Co.*, 410 F.2d 178 (5th Cir. 1969).

52. *Gele v. Chevron Oil Co.*, 574 F.2d 243 (5th Cir. 1978).

53. *Culver v. Slater Boat Co.*, 644 F.2d 460 (5th Cir. 1981), reh'g *en banc*, 688 F.2d 280 (1982).

54. *Kelloch v. S & H Subwater Salvage, Inc.*, 473 F.2d 767 (5th Cir. 1973).

55. *Williams v. Brasea, Inc.*, 497 F.2d 67 (5th Cir. 1974).

56. *Araujo v. Woods Hole, Martha's Vineyard, Nantucket S.S. Authority*, 693 F.2d 1 (1st Cir. 1982).

57. See *Wallenius Bremen G.m.b.H. v. United States*, 409 F.2d 994 (4th Cir. 1969); *White v. Johns-Manville Corp.*, 662 F.2d 243 (4th Cir. 1981).

58. *Pasco Marketing, Inc. v. Taylor Towing Serv., Inc.*, 554 F.2d 808 (8th Cir. 1977); *E.I. DuPont De Nemours & Co. v. Riverway Harbor Serv. St. Lewis, Inc.*, 639 F.2d 404 (8th Cir. 1981).

being careless toward its longshoreman employee.<sup>59</sup> *Burnside* was decided in 1969. In 1975 two courts of appeals, without having to decide the matter, questioned whether the *Burnside* doctrine had survived the 1972 Amendments because of new language in 33 U.S.C. section 905(b) that "[t]hat remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter".<sup>60</sup> In 1975 also, however, the Ninth Circuit Court of Appeals had in dictum noted the *Burnside* doctrine as living law<sup>61</sup> and in 1983 the same court parlayed this dictum into a holding that the employer could definitely maintain a direct action against the vessel owner.<sup>62</sup>

The matter has probably been put to rest by another dictum, this time from the Supreme Court in 1983 in the *Pallas Shipping Agency* case.<sup>63</sup> That case concerned whether a longshoreman's claim had been assigned to his employer by failure to bring suit within six months of acceptance of compensation payments. In discussing this issue the Court said: "[E]ven without a statutory assignment of the longshoreman's claims, an employer can seek indemnification from negligent third parties for payments it has made to the longshoreman." The Court then cited the *Burnside* case and the Ninth Circuit holding.<sup>64</sup> While this statement does not foreclose consideration of the matter by the Supreme Court when it is actually presented, such dicta usually become holdings.

#### *Insurance as a Substitute for Forbidden Indemnity*

Contract requirements to obtain insurance for the benefit of the other party or to name the other party as an additional insured have long been familiar in maritime law and commerce. They are found in charters, contracts of carriage, towing contracts and service contracts. The abolition of *Ryan* indemnity in 1972 was accomplished by the following language: "[T]he employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void."<sup>65</sup>

This prompts at least two questions. The first is whether the vessel may validly contract with the stevedore to provide insurance for the vessel covering longshoremen's injuries, and the second is whether, if

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59. *Federal Marine Terminals, Inc. v. Burnside Shipping Co.* 394 U.S. 404, 89 S. Ct. 1144 (1969).

60. *Landon v. Leif Hoegh & Co.*, 521 F.2d 756 (2nd Cir. 1975); *Cella v. Partenreederei M.S. Ravenna*, 529 F.2d 15 (1st Cir. 1975).

61. *Dodge v. Mitsui Shintaku Ginko K.K. Tokyo*, 528 F.2d 669 (9th Cir. 1975).

62. *Crescent Wharf & Warehouse Co. v. Barracuda Tanker Corp.*, 696 F.2d 703 (9th Cir. 1983).

63. *Pallas Shipping Agency, Ltd. v. Duris*, 461 U.S. 529, 103 S. Ct. 1991 (1983).

64. *Id.* at 534, 103 S. Ct. at 1996.

65. 33 U.S.C. § 905(b) (1983).

the stevedore in fact does so, the insurance is valid and enforceable by the vessel. The Ninth Circuit Court of Appeals in *Price v. Zim Israel Navigation Co.*<sup>66</sup> has apparently answered both these questions in the affirmative, but the answer to one of them may be illusory.

The case involved a contract between Zim, the shipowner, and its stevedore in which Zim agreed to indemnify the stevedore against losses resulting from the negligence of Zim or unseaworthiness of Zim's vessels, and the stevedore agreed to have Zim named as a co-insured in its insurance policies. In accordance with the latter provision the stevedore obtained from its comprehensive general liability underwriters an endorsement naming Zim. Price, a longshoreman employed by the stevedore, sued Zim. The underwriters refused to defend and, in a suit brought by Zim against the underwriters, they contended that the endorsement was void under the 1972 Amendments. The Court of Appeals examined the legislative history and concluded that a purpose of the statute was to "foreclose all theories under which *Ryan* triangle suits might be brought rather than to prevent insurance arrangements such as before us."<sup>67</sup>

The court considered that one of Congress' main purposes was to eliminate costly litigation and that nullifying the endorsement in this case would not help meet that purpose. The court went on to observe that the purpose of such a contract provision "may well be merely to allocate initially the burden of procuring insurance" and that "[t]he economic burden of the premiums can be allocated as the parties wish."<sup>68</sup> The author has found no other appellate decision on this point but has found a district court case in which the judge expressly declines to follow *Price*.<sup>69</sup>

While the Court of Appeals appeared to rationalize the insurance requirement in the stevedore contract, one must keep in mind that the action was not against the stevedore and we may wonder what the result would have been if the insurance endorsement had not been obtained. In an action against the stevedore for not obtaining the agreed endorsement, the damages would have been the amount of the vessel's liability to the longshoreman and a judgment against the stevedore would

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66. 616 F.2d 422 (9th Cir. 1980).

67. *Id.* at 428.

68. *Id.* at 429.

69. *Voison v. O.D.E.C.O. Drilling, Inc.*, 557 F. Supp. 715 (E.D. Tex. 1982). After this article was submitted, however, the 5th Circuit Court of Appeals reversed this decision, following the 9th Circuit decision in *Price* and finding no congressional purpose to outlaw additional assured clauses and holding the stevedore liable for failure to have the shipowner named as an additional assured. *Voison v. O.D.E.C.O. Drilling co.*, 744 F.2d 1174 (5th Cir. 1984).

appear to violate the statute directly. Would the court rationalize the result by saying damages recovered were not "damages by reason" of "the negligence of a vessel" in the language of the statute but were damages by reason of a breach of contract? Such a rationale may be difficult for some to accept, but, on the other side of the question, the Court of Appeals has a good point that the insurance provision serves well to eliminate third-party suits and that there is no policy to be found within or without the Act against allowing the parties to bargain as they wish over the insurance premiums. But one should consider that, if the policy endorsement is not obtained by the stevedore and the stevedore is then sued for breach, the third-party suit has not been eliminated, as the Court of Appeals thought.

One is reminded, at any rate, of those cargo cases indicating that, while a cargo owner may not be required to protect a common carrier with insurance, the carrier may be able by contract to obtain the benefit of insurance actually in force.<sup>70</sup> It may well be resolved that where insurance exists it may be enforced by the vessel and where it does not the lack of it may not be made the basis of a claim against the employer.

The trend to contribution starts with the *Cooper Stevedoring* case<sup>71</sup> by which contribution was reinstated as the norm in cases of injury jointly caused. That case and its ordinary application to areas unaffected by the prohibition in the Act has already been discussed sufficiently. As was also pointed out, by virtue of the *Reliable Transfer* case<sup>72</sup> proportional fault is the rule of contribution. What is remarkable, however, is the trend toward displacement of tort or restitution indemnity by contribution and an indication that contribution may extend beyond the tort field and be applied to breaches of contract.

In 1979, in a case where a longshoreman's injury was caused by the combined negligence of the owner and the owner *pro hac vice* of a vessel, and the latter sought indemnity from the former on the basis of active and passive negligence,<sup>73</sup> the Third Circuit Court of Appeals thought such indemnity would be strongly at odds with the preference for comparative fault shown by the Supreme Court in the *Reliable Transfer* case and therefore denied full indemnity and affirmed a proportional award.

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70. Cf. *Phoenix Ins. Co. v. Erie & Western Transp. Co.*, 117 U.S. 312, 6 S. Ct. 750 (1886); *Fluor Western, Inc. v. G.& H. Offshore Towing Co.*, 447 F.2d 35 (5th Cir. 1971); *The Ferncliff*, 22 F. Supp. 728 (D. Md. 1938), *aff'd*, 105 F.2d 1021 (4th Cir. 1939).

71. *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106, 94 S. Ct. 2174 (1974).

72. *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397, 95 S. Ct. 1708 (1975).

73. *Griffith v. Wheeling-Pittsburgh Steel Corp.*, 610 F.2d 116 (3d Cir. 1979).



In a case of a seaman's injury caused by the negligence of several parties, the Fifth Circuit Court of Appeals in 1982 considered that an active/passive negligence indemnity judgment was inappropriate in light of the *Reliable Transfer* case and remanded for apportionment of damages based on comparative fault.<sup>74</sup> In another seaman's case in 1983,<sup>75</sup> the First Circuit Court of Appeals, reviewing an indemnity award, took note of the Fifth Circuit indication that the active/passive rule had no function in a comparative fault system, but did not have to decide the question as they had found the conditions for the indemnity on that basis had not been met in any event and reversed on that account.

A more startling result has been reached by the Eleventh Circuit Court of Appeals in another seaman's case in 1983.<sup>76</sup> A seaman while at sea fell through hatchboards which were found to be in an unseaworthy condition as a result of the stevedore's breach of the warranty of workmanlike performance in closing up the hatch. The seaman obtained a judgment against the stevedore, the stevedore sued the shipowner for indemnity or contribution, and the shipowner counterclaimed for indemnity. The shipowner won in the lower court, obtaining judgment against the stevedore for attorneys' fees and expenses. The Court of Appeals reviewed the background of *Ryan* indemnity extensively and reaffirmed the vitality of the warranty of workmanlike performance but drew a distinction between longshoremen and seamen, concluding that the original justification for *Ryan* indemnity did not apply to controversies involving seamen injured at sea. It therefore treated *Ryan* as a very special case rather than an instance of the consequences of a breach of contract. Having concluded that *Ryan* did not require a finding of liability, the court perceived three approaches as follows:

[1] engage in an analysis, reminiscent of *Ryan*, to determine whether as a general matter the shipowners or stevedores are better able to take protective measures in cases such as this and impose liability on that class in all cases; [2] engage in an analysis . . . to determine whether in this case Smith & Kelly or the vessel was best positioned to avoid the accident and impose liability on that party; [3] apportion liability between the parties by applying principles of comparative fault.<sup>77</sup>

The court observed that the first two approaches were all-or-nothing allocations and chose the third, on the grounds that it provided incentives of care to both parties, was the fairest solution, and was consistent

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74. *Loose v. Offshore Nav., Inc.*, 670 F.2d 493 (5th Cir. 1982).

75. *Maritime Overseas Corp. v. Northeast Petro. Indus., Inc.*, 706 F.2d 349 (1st Cir. 1983).

76. *Smith & Kelly Co. v. S/S Concordia Tadj*, 718 F.2d 1022 (11th Cir. 1983).

77. *Id.* at 1028 (footnotes omitted).

with what it saw as "a wave of recent precedents [calling] for application of comparative fault principles."<sup>78</sup>

The case just described does not purport to make comparative fault the rule in contracts. It is rationalized in a very restrictive way. It is also true that the stevedore's responsibility to defend its own employees is different from that with respect to the seamen whom it does not employ. That difference, however, does not underlie the warranty of workmanlike performance but rather underlies the standards by which workmanlike performance is measured. At any rate, contribution has been applied to a breach of a duty arising from a contract between the parties and it will be interesting to see if contribution further invades the contract area.

It was stated earlier that the nineteenth and early twentieth centuries evidenced a strong trend toward the most equitable apportionment, perhaps leading ultimately to a universal application of contribution and apportionment. It seems that the accident which interrupted that trend can now easily be identified. The trend was interrupted by jurisprudence created by the existence of the Act and the accident of *Sieracki*. With *Sieracki* and some of its immediate consequences behind us, the law is now free to resume the previous course, apart from restrictions imposed by positive law as in the case of section 905(b).

#### *The Effect of Settlement With A Joint Tortfeasor*

A special contribution problem arises when one of the contributors makes his contribution by way of settlement before the apportionment of fault and the amount of damages have been determined. When degrees of fault and amount of loss are ultimately settled, will the contributor be forced or allowed to adjust his settlement contribution? The answer in maritime law seems clearly and quite properly to be negative.

Generally, there are two ways of charging against the plaintiff the recovery he has made by settlement against one joint tortfeasor when entering judgment against another. These are the *pro tanto* and *pro rata* rules. Under the *pro tanto* rule, the court credits the defendant with the actual amounts paid by any other defendants in settlement and the non-settling defendant therefore pays the full damages less amounts received from others. Under the *pro rata* rule, the non-settling defendant pays that proportion of the total damages which corresponds to his proportion of the fault and is therefore credited with other tortfeasors' proper proportions regardless of the sums actually received from them in settlement.

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78. *Id.* at 1029.

The leading case, *Leger v. Drilling Well Control, Inc.*,<sup>79</sup> comes again from the Fifth Circuit. Leger was an employee of Drilling Well Control, Inc. [DWC] and was injured while working on a barge owned by Dresser in connection with an oil well owned by Continental. He settled with everyone but Dresser, and evidently he made good settlements. At trial the degrees of fault were found as follows: Dresser 45 percent, Continental 20 percent, DWC 0 percent, Leger 35 percent. Dresser contended for the *pro tanto* rule, under which the large settlements already obtained would leave Dresser liable for about \$2,000. But the *pro rata* rule prevailed, making Dresser liable for about \$127,000 and giving Leger the benefit of the bargains by which the others had bought his claims. The court rejected Dresser's contention that *pro rata* reduction gave Leger a double recovery and considered that the *pro rata* rule best balances the relative risks of the parties. An important consideration behind the rule is that it encourages settlements by making final settlement possible without the risk of recourse by another party who has paid more than his proper share would have been if all parties had been before the court.

In a short opinion the Eleventh Circuit Court of Appeals has embraced the *pro rata* rule on the authority of the *Leger* case, denying the non-settling defendant credit for a very large settlement exceeding the total damages.<sup>80</sup>

This problem has not come to the appellate courts very often but the *pro rata* rule of *Leger* has been uniformly applied in a number of district court decisions.<sup>81</sup> In one of those cases, a plaintiff who ultimately proved \$233,000 in damages had settled for \$40,000 with a party who was held to have been 2/3 responsible, and he was held to his bargain, recovering against the other defendant under the *pro rata* rule only one-third of his damages.<sup>82</sup>

The proof of degrees of fault of parties, not all of whom are before the court, raises some problems. One of these is illustrated in *Ebanks v. Great Lakes Dredge & Dock Co.*<sup>83</sup> The seamen, employed by Great Lakes and working on its barge when it was struck by a tanker owned by Chevron, settled with Chevron and brought suit against their employer, who filed a third-party action against Chevron, which was severed for a separate trial. At the trial of the plaintiffs' claim against Great

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79. 592 F.2d 1246 (5th Cir. 1979).

80. Gormly v. Van Ingen, 736 F.2d 624 (11th Cir. 1983).

81. Fruge v. Damson Drilling Co., 423 F. Supp. 1276 (W.D. La. 1976); Doyle v. United States, 441 F. Supp. 701 (D.S.C. 1977); Kizer v. Peter Kiewit Sons Co., 489 F. Supp. 835 (N.D. Cal. 1978); Barger v. Petroleum Helicopters Inc., 514 F. Supp. 1199 (E.D. Tex. 1981).

82. *Kizer*, 489 F. Supp. at 835.

83. 688 F.2d 716 (11th Cir. 1982).

Lakes, the jury was instructed to make findings as to the comparative fault of Great Lakes and Chevron and found that while Great Lakes was negligent, its negligence did not cause the injuries to the plaintiffs and instead Chevron was 100 percent at fault. The seamen contended on appeal that the trial court was wrong in asking the jury to determine comparative fault as to a nonparty and the court of appeals agreed, apparently on the basis of a rather worldly view of how juries function as contrasted with their instructions. The court said:

[The jury's finding] is not so unusual when one considers that the trial court gave the jury the opportunity to pin 100 percent of the causation on Chevron, an obviously solvent participant in the tragedy . . . [T]he jury may well have thought it was establishing 100 percent right of recovery in the plaintiffs against Chevron, since, of course, they knew nothing of the settlement. They, thus, may have paid little attention to the subsidiary question whether Great Lakes' negligence contributed to the injuries.<sup>84</sup>

The Court of Appeals concluded that the comparative fault of the parties should have been fought out in the third party suit between Great Lakes and Chevron and distinguished the *Leger* case on the basis that the "record seems to indicate that all parties were present and in court to defend their own relative positions at the time the percentage issue was being presented to the jury."<sup>85</sup> The *Ebanks* case was decided a year before the same Court of Appeals wrapped its arms firmly around the *Leger* decision. It does not seem that *Ebanks* can be reconciled with *Leger*. *Leger* requires apportionment of the faults of settling and non-settling parties. *Ebanks* would have that apportionment accomplished in the severed third-party action between the settling and non-settling party, but under *Leger* there would be no right to maintain that third-party action, and it should therefore be dismissed.

It is hard to tell what, if any, will be the influence of this Eleventh Circuit case in different circumstances, as when there is no alternative suit pending for the determination of the percentage. Suffice it to say, however, that the determination of relative percentages when all parties are not present is fraught with problems and a great deal of care must be taken with it.

The *pro rata* theory should prevail. It is in accord with the Uniform Comparative Fault Act, serves very practical policies as expounded in *Leger*, and is in complete accord with the doctrinal foundation of contribution in maritime law.

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84. *Id.* at 718-19.

85. *Id.* at 720.

## CONCLUSION

Contract indemnity is alive and vigorous in the field of maritime injury except in those narrow circumstances in which it is forbidden. But, while doctors of the highest authority have pronounced the warranty of workmanlike performance to be alive and well, it appears to be ailing and suffers from conflicting diagnoses. As a consequence, contract indemnity based on it appears to have a somewhat unsteady existence. Tort or restitution indemnity based upon primary and secondary liability or active and passive negligence is also alive but may not live very long. The spirit of contribution is in full vigor, and it makes itself felt everywhere, usually at the expense of indemnity. When in doubt, bet on contribution and proportional liability to survive.